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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 MARC HOWARD BERGER,

17 Defendant.

No. CR-17-0491-RS

**DEFENDANT'S NOTICE OF MOTION
AND MOTION FOR DEFENSE-
WITNESS IMMUNITY OR, IN THE
ALTERNATIVE, DISMISSAL OF THE
INDICTMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

18 Date: March 28, 2018
19 Time: 10:30 a.m.
20 Dept: Courtroom 3, 17th Floor
21 Judge: Hon. Richard Seeborg

22 Date Filed: February 22, 2018

23 Trial Date: July 9, 2018

24 **REDACTED VERSION OF DOCUMENT(S) FOR PUBLIC FILING**

1
2 **NOTICE OF MOTION AND MOTION**

3 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD IN THIS ACTION:**

4 PLEASE TAKE NOTICE that on March 28, 2018, at 10:30 a.m., or as soon thereafter as
5 counsel may be heard, in Courtroom 3, 17th Floor of the United States District Court for the
6 Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant
7 Marc H. Berger will and hereby does move for order for defense-witness immunity or, in the
8 alternative, dismissal of the indictment for violation of the Fifth Amendment.
9

10 This motion is based upon the following Memorandum of Points and Authorities, the
11 Declaration of Miranda Kane submitted herewith, the exhibits attached thereto, oral argument, and
12 the pleadings and exhibits on file with the Court.

13 Respectfully submitted,

14 Dated: February 22, 2018

KANE+KIMBALL LLP

16 /s/ Miranda Kane
17 MIRANDA KANE
18 JULIA M. BREYER

19 Attorneys for Marc Berger
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Defendant Marc H. Berger, a CPA with over 40 years of accounting experience and an
4 otherwise unblemished record, was on the eve of retirement when he was blindsided by an early
5 morning arrest at his home in Walnut Creek, California on September 18, 2017, after a grand jury
6 returned an indictment alleging three counts of aiding and assisting in the preparation of a false tax
7 return in violation of 26 U.S.C. § 7206(2). The charges stem from Mr. Berger's role as a tax partner
8 at Burr Pilger Mayer ("BPM"), a top regional accounting firm, where he was the engagement
9 partner responsible for overseeing the preparation and signing of the tax returns of G. Steven Burrill
10 and Kelli Burrill, as well as a number of Mr. Burrill's wholly-owned eponymous entities. Among
11 them was Burrill Capital Management LLC ("Burrill Capital"), which served as the management
12 company of Life Sciences Fund III ("Fund III" or the "Fund"), a venture capital fund in the biotech
13 industry.

14 The indictment charges Mr. Burrill with wire and securities fraud relating to his directing
15 cash transfers from Fund III to Burrill Capital in excess of the regular management fees to which
16 Burrill Capital was entitled from 2009 through 2013, as well as tax evasion based on his failure to
17 declare these cash transfers as income. *See* Dkt. No. 1 ¶¶ 7-11. Mr. Burrill pleaded guilty on
18 December 7, 2017, to one count of Investment-Advisor fraud in violation of 15 U.S.C. §§ 80b-6 &
19 80b-17 & 17 C.F.R. § 275.206(4)-8 and one count of tax evasion in violation of 26 U.S.C.
20 § 7206(1) pursuant to a written plea agreement [REDACTED]

21 [REDACTED]. Dkt. No. 27.

22 The case against Mr. Berger turns on whether he knew that the transfers described above
23 were prepaid management fees, as the government contends—in which case the full amount should
24 have been classified as deferred revenue and included as income on Mr. Burrill's tax returns—or
25 whether, as Mr. Berger maintains, he had reason to believe the transfers were properly characterized
26 as loans for which Mr. Burrill was personally liable to repay—in which case the money was not
27 taxable income. Mr. Berger needs to call the witnesses who are the subject of this motion in order
28 to present evidence of his state of mind in preparing Mr. Burrill's tax returns and, more specifically,

1 why he accepted Mr. Burrill's characterization of the transfers as loans. However, those witnesses,
2 absent a grant of immunity, will invoke their Fifth Amendment right to remain silent if called to
3 testify.

4 Mr. Berger therefore seeks an order directing the government to grant use immunity to other
5 tax professionals from BPM who contributed to the preparation of the tax returns at issue in this
6 case. Specifically, the BPM Witnesses include [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED] Without such an order, the government will effectively prevent Mr. Berger
10 from presenting a defense and, as a result, deny him his due process right to a fundamentally fair
11 trial.

12 II. BACKGROUND

13 A. The Government's Allegations

14 The indictment charges Mr. Burrill with thirty-one counts, including various fraud charges
15 and tax evasion. Dkt. No. 1. The indictment alleges that Mr. Burrill perpetrated a complex fraud
16 scheme through which he initiated capital calls for Fund III investor funds totaling more than \$18
17 million and used the money to cover cash flow shortages at the Burrill entities, which he wholly
18 owned and controlled, in violation of the requirements of the Limited Partnership Agreement. *Id.*
19 ¶¶ 1, 5-11.

20 The gravamen of the allegations against Mr. Berger is that he assisted in the preparation of
21 false personal tax returns for Mr. Burrill and his wife by failing to treat the cash transfers from Fund
22 III as income to Mr. Burrill. *Id.* ¶ 24. The indictment alleges that Mr. Berger was the signing
23 partner and paid preparer on Mr. Burrill's returns and that other BPM accountants assisted in the

24 ¹ Additionally, there are two other categories of exculpatory defense witnesses for whom Mr.
25 Berger is not currently seeking immunity as he has no knowledge of their intention to invoke their
26 Fifth Amendment right to remain silent if called to testify. They are members of the PwC audit
27 team—[REDACTED]—and individuals employed
28 by or associated with Burrill entities, including staff and managing directors or investors—[REDACTED]. Many of
the witnesses in these categories testified under oath subject to cross examination in related
administrative hearings before the SEC. Their former testimony may be admissible in the event
they invoke the Fifth Amendment. *See* Fed. R. Evid. 804(b)(1). Mr. Berger reserves the right to
move for compelled judicial immunity for these witnesses in the future.

1 preparation of the returns, which reported income and expenses related to the Fund, the Burrill
2 entities, and Mr. Burrill individually. *Id.* ¶ 2. Mr. Berger is the only individual from BPM who has
3 been criminally charged. Aside from a conclusory allegation that Mr. Berger made or caused false
4 entries to be made on the books and records of the Burrill Entities, *id.* ¶ 9(f), there are no allegations
5 suggesting that Mr. Berger was part of the larger fraud scheme charged against Mr. Burrill. In order
6 for the government to sustain its burden, it must prove beyond a reasonable doubt that Mr. Berger
7 actually knew that the facts did not support his tax treatment of the Fund III transfers at the time he
8 assisted in preparation of Mr. Burrill's returns.

9 **B. Administrative Proceedings Related to Mr. Burrill**

10 The instant case follows on the heels of extensive regulatory inquiries and administrative
11 proceedings into Mr. Burrill's conduct. The IRS began an administrative audit of the Burrill entities
12 in 2013, and later that year the matter was referred to the IRS Criminal Investigation Division
13 ("CID"). Mr. Berger and his colleagues at BPM assisted in CID's investigation. Declaration of
14 Miranda Kane ("Kane Decl.") ¶ 9.²

15 The SEC initiated administrative proceedings in 2014 to investigate securities law violations
16 against Burrill Capital, Mr. Burrill, and two Burrill Capital executives: Victor Hebert, an
17 experienced corporate attorney formerly of Heller Ehrman and longtime member of the California
18 bar, who filled the roles of Chief Administrative Officer, Managing Director, and Chief Legal
19 Officer, and Chief Financial Officer Helena Sen, a licensed CPA. The SEC did not investigate Mr.
20 Berger.

21 BPM produced thousands of documents in response to SEC subpoenas it received in the
22 spring of 2014. Kane Decl. ¶ 10. Mr. Berger testified as a witness in the SEC's administrative
23 proceedings in August 2014. Ex. 3. Mr. Berger, represented by BPM's outside counsel, described
24 in detail, among other things:

- 25 • His relationship with Mr. Burrill—friendly but strictly professional, though they had
26 known each other for many years since they both worked as CPAs at Ernst & Young
27 decades before, *id.* at SEC-SFRO-003040 – SEC-SFRO-003041;

28 ² All exhibits referenced in this motion refer to those attached to the Kane Decl.

- 1 • The roles of other BPM staff who worked on the Burrill tax returns, including [REDACTED]
2 [REDACTED], *id.* at SEC-SFRO-003043;
- 3 • The conversations Mr. Berger had with [REDACTED] about the Fund III
4 transfers—specifically, that Mr. Berger asked them if Mr. Burrill had personal
5 liability for the cash transfers he saw listed as “deferred revenue” on the management
6 company’s books;
- 7 • That Mr. Berger relied on [REDACTED] representations regarding the
8 characterization of the transfers as loans, *id.* at SEC-SFRO-003045 & 3054; and
9 • His recommendation, after [REDACTED] advised him that the transfers
10 were a personal obligation debt, that the Burrill Capital books be modified to reflect
11 the transfers as a liability rather than deferred revenue, and that Mr. Burrill execute a
12 promissory note to further document the loan, *id.* at SEC-SFRO-003047 – SEC-
13 SFRO-003061.

14 Regarding the creation of a promissory note, Mr. Berger testified that the intent of his
15 recommendation was not to change the character of the cash transfers – because a promissory note
16 cannot accomplish that, but to have documentary evidence to support their characterization as loans
17 in the event of an IRS audit. *Id.* Mr. Berger testified that to his knowledge the promissory note was
18 never executed. *Id.* at SEC-SFRO-003065.

19 Ultimately, the SEC settled the administrative proceedings against Mr. Burrill and his
20 company colleagues on March 30, 2016, with the respondents neither admitting nor denying
21 violations of securities laws. As part of the settlement, the respondents agreed to the entry of an
22 administrative order finding that, with the help of Mr. Hebert and Ms. Sen, Mr. Burrill
23 misappropriated approximately \$18 million from Fund III under the guise of advanced management
24 fees. Ex. 4. The SEC further found that Burrill Capital and Mr. Burrill willfully violated, and Mr.
25 Hebert and Ms. Sen willfully aided and abetted and caused, Burrill Capital and Mr. Burrill to
26 perpetrate a fraud on the fund’s investors by lying to them about their use of the capital called to the
27 Fund and using it instead for purposes unrelated to the Fund—namely, to float the other Burrill
28 entities, and enrich Burrill personally. *Id.* at 9. The settlement did not involve charges or liability

1 for Mr. Berger.

2 The prestigious “Big Four” accounting firm PwC audited Fund III’s financial statements.
3 Later, the SEC also brought administrative charges against Adrian Beamish, the PwC engagement
4 partner overseeing the audit. *See In re Adrian Beamish*, No. 3-17651 (SEC). Mr. Berger was not
5 implicated in this proceeding, either. The Beamish matter proceeded to a hearing before an
6 administrative law judge at which a number of the proposed defense witnesses here, as well as a
7 number of witnesses from PwC, provided testimony and were subject to both direct and cross
8 examination. PwC witnesses testified about the related parties footnote in the audited financials,
9 which historically disclosed that Fund III’s “Prepaid expenses and other receivables” included
10 money – the amount which increased each year – “receivable from the general partner.” Ex. 5.
11 PwC witnesses testified that in 2012 they proposed additional language to that footnote that would
12 have disclosed that Fund III had advanced more cash to the management company than could be
13 earned as management fees over the remaining life of the fund, but they removed that language
14 from the disclosures at Mr. Burrill’s request. *See, e.g., id.* at SEC-SFRO-001741; Ex. 6 at SEC-
15 SFRO-001561 – SEC-SFRO-001562. They further testified that they learned of the promissory
16 note that documented the terms under which Mr. Burrill transferred additional cash from Fund III to
17 the management companies during the 2012 audit and recommended including the terms of the note
18 in the related parties footnote. PwC ultimately gave an unqualified opinion without altering the
19 related parties footnote in the financial statements after Ms. Sen told them the note had been
20 withdrawn. *See, e.g., Ex. 5* at SEC-SFRO-001737 – SEC-SFRO-001745; Ex. 6 at SEC-SFRO-
21 001556 – SEC-SFRO-001568.³

22 The Beamish matter settled on September 7, 2017. Ex. 7. Mr. Beamish neither admitted nor
23 denied violations of securities laws but agreed to the entry of an administrative order finding that he
24 failed to comply with professional standards by failing to scrutinize the cash transfers that Mr.
25 Burrill routed to his management company from Fund III and improperly signing audited financial
26 statements that did not comply with Generally Accepted Auditing Standard. *Id.* at 2. At bottom,

27 ³ There is no evidence in the record that the PwC auditors were in communication with BPM tax
28 preparers, which is not unusual, or that Mr. Berger was privy to dialogue between PwC and Mr.
Burrill and his associates regarding the Fund III audit.

1 the SEC found that Mr. Beamish failed to take sufficient steps to verify whether the management
2 company had the ability to repay the Fund, rendering the audited financial statements misleading
3 and inaccurate. *Id.* at 10-11. The SEC imposed a one-year bar on Mr. Beamish's ability to practice
4 as an accountant. *Id.* at 12.

5 The California Franchise Tax Board ("FTB") also audited the Burrill entities' tax returns.
6 Jeffry Bernstein of Coblenz Patch Duffy & Bass LLP, represented Mr. Burrill in that matter and
7 Mr. Berger, at Mr. Burrill's request, assisted Mr. Bernstein in preparing a response. On June 2,
8 2016, Mr. Burrill, through Mr. Bernstein, represented to the FTB that the cash transfers from Fund
9 III to the management company were loans for which Mr. Burrill was personally liable.⁴ *See* Ex. 8.

10 C. Criminal Investigation & Grand Jury Proceedings

11 The United States Attorney's Office also investigated Mr. Burrill with the assistance of the
12 FBI and IRS-CID. In April 2015, [REDACTED] and engaged
13 in a months-long attempt to produce responsive documents, though its efforts never appeared to
14 satisfy the government. [REDACTED]

15 [REDACTED]
16 [REDACTED]. *See* Exs. 9-12. The same
17 attorneys—a litigation firm that BPM typically retained for malpractice matters—represented all
18 four BPM witnesses as well as the company.

19 The United States Attorney's Office ("USAO") initially attempted [REDACTED]
20 [REDACTED]. Two
21 months later, the government asked their shared attorney to [REDACTED]
22 [REDACTED]. *See* Kane Decl. ¶ 17. [REDACTED]. *See id.*
23 ¶ 18 & Exs. 9, 10. Consistent with Mr. Berger's 2014 SEC testimony, [REDACTED]
24 [REDACTED]. Ex. 9 at 116. [REDACTED]

25 ⁴ This motion does not include emails between Msrs. Burrill, Bernstein, and Berger because the
26 parties are still litigating the issue of whether the attorney-client privilege prohibits disclosure of
27 these communications. Mr. Berger intends to file a motion describing these privileged emails and
28 other discovery issues separately. Mr. Berger anticipates that Burrill may waive privilege regarding
these documents prior to the March 28, 2018 hearing in this matter. If so, Mr. Berger seeks leave to
supplement the briefing to include relevant exhibits.

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[REDACTED]

. Ex. 10 at 21-22, 26-27, 32.

[REDACTED]

. Ex. 9 at 97-100, 108; Ex. 10 at 23, 25-27, 33, 35-38, 45-50,

77-78.

[REDACTED]

. Ex. 9 at 82, 88-90, 101, 103, 108-109.

[REDACTED]

in March 2016,

[REDACTED]

. Kane Decl. ¶ 21 & Ex. 13.

[REDACTED]

. Ex. 13

at 7-8.⁵

[REDACTED]

. Ex. 13 at 88.

[REDACTED]

.⁶ Kane Decl. ¶ 5.

[REDACTED]

⁵ [REDACTED]

⁶ [REDACTED]

1 [REDACTED] See Kane Decl. ¶ 31. He assumed the
2 government had declined to prosecute Mr. Burrill and the matter was over. As it turned out, a new
3 grand jury was empaneled in the summer of 2017.

4 [REDACTED]
5 [REDACTED]
6 [REDACTED] Ex. 14 at 42-43, 57-58.
7 [REDACTED]
8 [REDACTED]

9 [REDACTED]
10 [REDACTED] Id. at 44-46.
11 [REDACTED]
12 [REDACTED]

13 [REDACTED]
14 [REDACTED] Id. at 60-62.
15 [REDACTED]
16 [REDACTED]

17 [REDACTED] Id. at 67-68, 98.
18 [REDACTED]
19 [REDACTED]

20 [REDACTED] Ex. 16 at 33-38.
21 [REDACTED]
22 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 Mr. Burrill was eventually indicted. So was Mr. Berger.

5 **D. The U.S. Attorney's Office's Charging Decisions**

6 The grand jury returned an indictment against Messrs. Burrill and Berger on September 15,
7 2017. Dkt. No. 1. Three days later—sixteen months after he testified before the grand jury and
8 having heard not a single word from the government during that time, *see* Kane Decl. ¶ 31—Mr.
9 Berger was arrested at 7:00 a.m. without warning at his home in Walnut Creek by armed federal
10 agents from the IRS and FBI. In contrast, Mr. Burrill, now residing in Wisconsin, received advance
11 notice of the indictment from the USAO through counsel, and was allowed to make his own
12 arrangements to voluntarily appear in this district for his initial appearance two weeks later. *See*
13 Dkt. No. 7. The government did not seek detention for either defendant, and both were released on
14 unsecured bonds.

15 As conspicuous as this post-charging arrest treatment between defendants is, the charging
16 treatment of Mr. Berger compared to other individuals who admittedly assisted Mr. Burrill in
17 perpetrating his fraud scheme is even more stark. On August 31, 2017, after the SEC settlement
18 order included findings that Mr. Hebert was instrumental in Mr. Burrill's fraud and hid from the
19 Fund's Investment Committee that he knew that Mr. Burrill was using the capital called to Fund III
20 to float the other Burrill entities and to pay personal expenses, Ex. 4 ¶¶ 23-25, the government
21 entered into a non-prosecution agreement ("NPA") with [REDACTED], pursuant to which the
22 government agreed not to prosecute [REDACTED] in exchange for his testimony. Ex. 15 at US
23 008859 – US 008864.⁸

24 ⁸ Several witnesses testified that [REDACTED] issued capital call letters to Fund III investors knowing
25 that the money would not be invested. He also spearheaded the effort to minimize reference to the
26 Fund III transfers in PwC's audited financials. *See, e.g.*, 14 at 36. The [REDACTED]
27 also indicated that [REDACTED] was complicit in Burrill's fraud. *See, e.g.*, Ex. 17 at 5 (describing
28 [REDACTED]'s statement that "[W]hat we did was probably illegal[,] referring to Burrill and [REDACTED]'s
conduct); Ex. 18 a 2 (noting that Burrill and [REDACTED] were very close and Burrill allowed Hebert to
act on his behalf); Ex. 19 at 2 ("[REDACTED] believed [REDACTED] 'knew everything' with respect to the pre-
calling and spending capital from Fund III."); Ex. 20 at 10 (describing his belief that [REDACTED] knew
that all of Fund III's capital had been called before the September 2013 disclosure to the managing
directors).

That Mr. Berger should be criminally charged, while [REDACTED] is shielded from prosecution is a mystifying exercise of prosecutorial discretion.⁹ Presumably, the government determined that [REDACTED] was essential to its case against Mr. Burrill as the factual statement attached to [REDACTED]'s NPA does not reference Mr. Berger or any communications [REDACTED] had with him or other BPM tax preparation staff. Ex. 15 at US 008864.

Ex. 16 at 33-38

. See Ex. 23 at 11-12 & Grand Jury Ex. 82.

As of the filing of this motion, the government has represented that it has not yet entered into a non-prosecution agreement with [REDACTED]. However, without [REDACTED] trial testimony, the government will be hard-pressed to make out a case against Mr. Berger since she was his primary Burrill entity contact.¹⁰ See Kane Decl. ¶ 7. On September 20, 2017, [REDACTED] and the government entered into a tolling agreement which tolled the statute of limitation on any possible charges against her until December 31, 2017. Ex. 22.

The USAO has represented that it has no plans to indict anyone else in this case and has already made charging decisions based on its assessment of the relative culpability of the individuals involved. Kane Decl. ¶ 6. The government has indicated that, for Mr. Berger, the fact

⁹ The fact that ██████ received an NPA rather than immunity has no legal significance here. Government witnesses who are granted favorable plea deals in return for their testimony are “immunized” within the meaning of *Straub*. See *United States v. Wilkes*, 744 F.3d 1101, 1105 n.1 (9th Cir. 2014) (citing *United States v. Young*, 86 F.3d 944, 948 (9th Cir. 1996)).

¹⁰ Mr. Berger does not presume to know how the government will ultimately resolve the outstanding immunity issue with respect to [REDACTED]. Throughout this motion, he assumes that [REDACTED] will reach an arrangement with the government that allows her to testify. However, even if Mr. Berger's prediction is not born out, that does not alter his request for defense witness immunity.

1 that he signed the returns was the tipping point in the decision to file criminal charges against him,
2 as opposed to others at BPM. *Id.*

3 **E. Procedural History of Criminal Case**

4 Mr. Burrill has entered a guilty plea to Investment-Advisor fraud and tax evasion pursuant to
5 a written plea agreement. *See* Dkt. No. 27. He agreed that he “improperly [took] money from the
6 Fund that [he] knew [his] management companies were not entitled to[.]” ultimately causing “the
7 Fund to transfer to entities [he] owned and controlled a total of approximately \$8 million in excess
8 of the total management fees that would have been earned over the course of the [Limited
9 Partnership Agreement governing the Fund].” *Id.* at 5. Mr. Burrill further agreed that he filed false
10 tax returns in 2010, 2011, 2012, 2013 because he did not include as income the unauthorized
11 advance management fees he caused to be transferred from the Fund to his management companies.
12 *Id.* at 6. Notably, the factual basis of Burrill’s plea agreement does not implicate Mr. Berger in any
13 wrongdoing.

14 On December 12, 2017, the Court set a jury trial for July 9, 2018, with jury selection to
15 begin July 6, 2018. Mr. Berger agreed to waive time until that date under the Speedy Trial Act. On
16 February 8, 2018, the parties were advised that the Court is no longer available in July and
17 requested that the parties choose a trial date in August 2018. The government is not available in
18 August, and the parties have since filed a joint statement requesting a trial date in June 2018.

19 On February 5, 2018, counsel for Mr. Berger wrote to the government requesting that it
20 consent to granting use immunity to the defense witnesses identified above.¹¹ The government
21 responded that it was unwilling to immunize any of the proposed defense witnesses. Kane Decl.
22 ¶ 4.

23 **F. Anticipated Testimony of BPM Witnesses**

24 Mr. Berger assumes that [REDACTED] will testify consistent
25 with their grand jury testimony, *see supra*, at 7-8 & n.5, at trial. Mr. Berger expects the following
26 exculpatory testimony from other BPM witnesses:

27 ¹¹¹¹ The February 5, 2018 request included all but one of the proposed defense witnesses listed here.
28 On February 15, 2018, counsel for Mr. Berger sought immunity for an additional witness, [REDACTED]
[REDACTED] who was not included in the February 5 email. The government eventually declined that
request for immunity, as well. *See* Kane Decl. ¶ 4.

- 1 • [REDACTED] a BPM tax partner who is licensed as both a CPA and an attorney, will
2 testify that he assisted in the preparation of Mr. Burrill's tax returns by responding to
3 Mr. Berger's request for advice about the appropriate tax treatment of the Fund III
4 transfers. Specifically, Mr. Berger expects [REDACTED] to confirm that he responded to
5 Mr. Berger's email inquiry by providing the citation to a particular case that supported
6 treatment of the payments as loans. Ex. 1.
- 7 • BPM tax partner [REDACTED] would also testify that she assisted in the
8 preparation of Mr. Burrill's tax returns by responding to Mr. Berger's request for advice
9 about the appropriate tax treatment of the Fund III transfers. [REDACTED] would
10 testify that, based on her understanding of the arrangement between the Fund and the
11 management company, and in reliance on PwC's footnote, she recommended treating the
12 cash transfers as loans. *Id.*
- 13 • BPM's [REDACTED] would testify that Mr. Berger and
14 [REDACTED] shared with him their approach to classifying the Fund III transfers as
15 loans, and that he agreed with and supported their approach and acknowledged that he
16 had taken that approach with other clients. Ex. 2.
- 17 • Current and former BPM tax partners [REDACTED]
18 [REDACTED]
19 [REDACTED] also received the same email from Mr. Berger seeking advice on the
20 appropriate tax treatment for the factual scenario the Burrill Fund III transfers presented.
21 Thus, Mr. Berger anticipates that they would each testify that he sought their advice
22 about the appropriate tax treatment of the transfers. Ex. 1.

23 III. LEGAL STANDARD

24 "In general, a defendant is not entitled to compel the government to grant use immunity to
25 potential defense witnesses who invoke their right against self-incrimination." *United States v.*
26 *Prince*, 524 F. App'x 377, 379 (9th Cir. 2013) (citation omitted). But a defendant may be able to
27 compel the government to immunize a witness if the government's use of immunity denies the
28

1 defendant the due process guaranteed by the Fifth Amendment. *United States v. Alessio*, 528 F.2d
2 1079, 1081-82 (9th Cir. 1976).

3 To show that due process requires the district court to compel use immunity, a defendant
4 must show that “(1) the witness’s testimony would have been relevant, and (2) the prosecution
5 refused to grant the witness use immunity with the deliberate intention of distorting the fact-finding
6 process.” *United States v. Straub*, 538 F.3d 1147, 1156 (9th Cir. 2008) (citing *Williams v.*
7 *Woodford*, 384 F.3d 567, 600 (9th Cir. 2004). The first prong presents only a “minimal” bar;
8 defendant “need not show that the testimony sought was either clearly exculpatory or essential to
9 the defense.” *Straub*, 538 F.3d at 1156 (citations omitted).

10 There are two ways to satisfy the second prong. The defendant must show that “*either* (a)
11 the prosecution intentionally caused the defense witness to invoke the Fifth Amendment right
12 against self-incrimination with the purpose of distorting the fact-finding process; *or* (b) the
13 prosecution granted immunity to a government witness in order to obtain that witness’s testimony,
14 but denied immunity to a defense witness whose testimony would have directly contradicted that of
15 the government witness, with the *effect* of so distorting the fact-finding process that the defendant
16 was denied his due process right to a fundamentally fair trial.” *Id.* at 1162 (emphasis added); *see*
17 *also United States v. Westerdahl*, 945 F.2d 1083, 1087 (9th Cir. 1991).

18 If the Court concludes that the government distorted the fact-finding process by causing a
19 defense witness to invoke his privilege against self-incrimination, the Court must dismiss the
20 indictment unless the government grants use immunity to the witness. *Straub*, 538 F.3d at 1161. If,
21 however, the Court concludes that the government selectively denied use immunity to defense
22 witnesses in a manner that distorts the fact-finding process, the government has three options: (1)
23 acquittal, if it continues to insist on granting immunity only to its witness; (2) proceeding to trial
24 using its immunized witness only if it invokes 18 U.S.C. §§ 6002-6003 to ask the district court to
25 extend use immunity to the defense witnesses at issue; or (3) attempt to proceed at trial without the
26 witness whose testimony the defense witnesses would have contradicted. *Straub*, 538 F.3d at 1161.
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28

1 **IV. ARGUMENT**

2 While judicially-compelled witness immunity is the exception rather than the rule, this case
3 is anything but typical. Here, Mr. Berger will be denied a fundamentally fair trial if the proposed
4 defense witnesses are not granted immunity. The government's conduct implicates both routes to
5 immunity described in *Straub*. First, the defense witnesses have relevant exculpatory testimony to
6 offer at trial on behalf of Mr. Berger. But the government has ensured the silence of any BPM at
7 trial for fear of possible indictment. *See Kane Decl.* ¶ 8. As a result, Mr. Berger will be deprived of
8 the opportunity to elicit critical exculpatory testimony. The government's withholding of
9 immunity, despite the fact that it has no real intent to prosecute any of the proffered defense
10 witnesses, requires the government to grant use immunity to these witnesses or, in the alternative, to
11 dismiss the indictment.

12 Second, the government has demonstrated that it is not adverse to providing this relief as
13 necessary to secure the testimony of its own witnesses. The government has already entered into a
14 non-prosecution agreement with [REDACTED] and is likely to reach a similar arrangement with [REDACTED]
15 [REDACTED] while refusing to afford even a single one of Mr. Berger's many proposed witnesses the same
16 protection. This selective denial of use immunity would distort the fact-finding process because all
17 of these potential defense witnesses would offer exculpatory testimony that directly contradicts the
18 anticipated testimony of the government's immunized witness(es). To assure due process, the Court
19 must level the playing field by compelling the government to grant use immunity to Mr. Berger's
20 witnesses, proceed without its immunized and cooperating witness(es), or dismiss the indictment.

21 **A. The Government has Intentionally Placed the Proposed Defense Witnesses in**
22 **Fear of Indictment to Provoke them into Invoking the Fifth Amendment**

23 1. The proffered defense witnesses will offer relevant exculpatory testimony.

24 The government must grant immunity to a defense witness if "the defense witness's
25 testimony w[ould be] relevant" and "the prosecution intentionally [sought to] cause[] the defense
26 witness to invoke the Fifth Amendment right against self-incrimination with the purpose of
27 distorting the fact-finding process." *Straub*, 538 F.3d at 1162. So it is here with respect to Mr.
28 Berger's proposed defense witnesses. As detailed above, the testimony of each of the BPM

1 witnesses tends to corroborate that Mr. Berger prepared the Burrill tax returns in good faith and is
2 therefore not criminally culpable.

3 Collectively, this testimony is directly relevant to Mr. Berger's defense to the indictment
4 allegations. That so many witnesses either were privy to Mr. Burrill's characterization—through
5 [REDACTED] of the transfers as loans, or substantiate that Mr. Berger sincerely
6 believed Mr. Burrill's characterization, demonstrate that Mr. Berger did not have the requisite state
7 of mind to support a criminal conviction for assisting in the filing of a false tax return. Depriving
8 Mr. Berger of the opportunity to present the proffered exculpatory testimony in his defense would
9 distort the fact-finding process.

10 2. Absent a grant of immunity, the government's aggressive charging posture in
11 this matter will force potential defense witnesses to invoke their Fifth
12 Amendment rights against self-incrimination.

13 Turning to the second portion of the test, the government has taken "affirmative steps" to
14 prevent these witnesses from testifying by putting them in a position where they will have no choice
15 but to invoke the Fifth Amendment if called to testify. *Straub*, 538 F.3d at 1157 (citation and
16 emphasis omitted). At some point between Mr. Berger's grand jury testimony on May 5, 2016—
17 when Mr. Berger was explicitly advised that he was not a target—and the presentation to a different
18 grand jury beginning in June 2017, and with no notice to him, the government changed its view of
19 Mr. Berger's status.¹² Mr. Berger's subsequent indictment put his BPM colleagues on notice of the
20 government's expansive view of what constitutes criminal conduct. Mr. Berger is now a cautionary
21 tale and the BPM witnesses and their counsel must evaluate the risks of testifying without immunity
22 against that backdrop.

23 The indictment alleges that Mr. Berger assisted in filing false and fraudulent tax returns for
24 Mr. Burrill from October 2012 until October 2014. The statute of limitations will not run on this
25 conduct for at least another year. *See* 26 U.S.C. § 6531(3) (setting forth a six-year statute of
26 limitations for willfully aiding or assisting in the filing false tax returns). The BPM witnesses who

27 ¹² Only [REDACTED] testified before the first grand jury following
28 Mr. Berger's testimony, and nothing else in the discovery produced to date explains the dramatic
shift with respect to the government's assessment of Mr. Berger. Kane Decl. ¶ 31.

1 assisted in the preparation of Burrill's returns are therefore still subject to prosecution. The
2 remaining allegations turn on Mr. Burrill's transfer of Fund III cash to his management company as
3 late as August 30, 2013, and the Burrill entity witnesses are not out of the woods based on their
4 participation and assistance in the wide-reaching fraud Mr. Burrill perpetrated against the fund's
5 limited partners.¹³

6 The grand jury investigation into this matter spanned three years and resulted in charges
7 against only Mr. Burrill and Mr. Berger. The government has not added any new defendants since
8 the indictment issued five months ago. To the contrary, it has represented to undersigned counsel
9 that it has already exercised its discretion to make charging decisions in this matter. *See Kane Decl.*
10 ¶ 6. And yet, the government refuses to immunize any of the proposed defense witnesses whose
11 testimony would aid in Mr. Berger's defense at trial. Holding the threat of indictment over a
12 witness's head with no actual intent to indict is the type of witness intimidation that constitutes
13 "substantial interference" with the witnesses' "free and unhampered determination to testify" and
14 that violates the defendant's right to due process. *Straub*, 538 F.3d at 1158.

15 In short, because the government intentionally has sought to ensure that the defense
16 witnesses would invoke their Fifth Amendment privilege against self-incrimination if called to
17 testify at trial, it must either seek use immunity for their testimony or dismiss the indictment.

18 **B. The Government's Selective Refusal to Immunize Potential Defense Witnesses**
19 **who would Contradict the Testimony of the Government's Immunized Witness**
20 **would Distort the Fact-finding Process.**

21 Another way to establish that the government's use of immunity violates the defendant's due
22 process right is to demonstrate that "the defense witness's testimony w[ould be] relevant" and that
23 "the prosecution granted immunity to a government witness in order to obtain that witness's
24 testimony, but denied immunity to a defense witness whose testimony would have directly
25 contradicted that of the government witness[.]" *Straub*, 538 F.3d at 1162. While the first prong of
the defense-immunity doctrine requires the defendant to establish intentional prosecutorial

26 ¹³ As noted above, a number of the subject defense witnesses have previously testified in earlier
27 proceedings related to the instant criminal matter without invoking the Fifth Amendment.
28 However, that testimony preceded the unpredicted indictment of Mr. Berger. The witnesses are
now on notice of the government's expansive interpretation of criminal liability in this matter, and
may analyze the inherent risk of self-incrimination differently as a result.

1 misconduct, this prong looks only to the effect of the government's selective grant of immunity.
2 *See id.*; *Westerdahl*, 945 F.2d at 1087. Put simply, the government's motive is not relevant under
3 this analysis, and compelled immunity is appropriate if denying the defendant the opportunity to
4 present contradictory evidence would distort the fact-finding process. *See Straub*, 538 F.3d at 1162;
5 *Westerdahl*, 945 F.2d at 1087.

6 Here, the government has already exercised its discretion to grant immunity in order to
7 secure the testimony of a favorable witness, [REDACTED]. And [REDACTED] immunity is all but
8 guaranteed for the reasons noted above. Moreover, Mr. Berger has shown that each of his potential
9 defense witnesses would offer relevant, exculpatory testimony that would contradict [REDACTED]
10 (and [REDACTED]), both directly and by implication. To prove beyond a reasonable doubt that a tax
11 preparer assisted in the filing of a false tax return, the government must prove not just falsity as to
12 material content of the tax return, but that the defendant *knew* the returns were not true as to every
13 material matter and that he willfully intended to violate the law. *See United States v. Dahlstrom*,
14 713 F.2d 1423, 1427 (9th Cir. 1983); *see also Kawashima v. Holder*, 565 U.S. 478, 484 (2012)
15 (noting that the elements of a § 7206(2) violation include that the defendant acted willfully).

16 Mr. Berger anticipates that [REDACTED] will testify that Mr. Berger *suggested* characterizing
17 the Fund III cash transfers as a loan on his own, not because Mr. Burrill, through [REDACTED] and
18 [REDACTED], described them that way when the characterization question was raised by Mr. Berger.
19 *See Ex. 21 ¶ 41*. If credited, the government will ask a jury to infer from [REDACTED] testimony
20 that Mr. Berger knew that Mr. Burrill had a significant tax liability and suggested the loan
21 characterization to shield Mr. Burrill from it unlawfully. [REDACTED] testimony would
22 directly contradict the immunized witness(es)' origin story of the loan characterization.
23 Specifically, [REDACTED] recalls that she and Mr. Berger *questioned* [REDACTED]
24 about the nature of the "deferred revenue" liability and, only *after* being told that Mr. Burrill was
25 personally liable, concluded that the transfers should be treated as a loan for tax purposes. Other
26 BPM tax partners' anticipated testimony regarding Mr. Berger's solicitation of advice on the matter,
27 also contradicts the immunized witnesses' testimony and tends to corroborate [REDACTED]. If
28 Mr. Berger had already devised a plan for Mr. Burrill to avoid taxes, whether or not supported by

1 the facts, there was no reason for Mr. Berger to seek input and guidance from his colleagues.
2 Similarly, if Mr. Berger was intentionally engaged in unlawful behavior it is unlikely that he would
3 broadcast his actions so broadly within BPM. Mr. Berger's email to other BPM partners suggests
4 conscientious tax preparation, not fraud and deceit.

5 There are no other witnesses or other sources of this crucial information about Mr. Berger's
6 lack of knowledge and intent besides the proposed defense witnesses, and their testimony would
7 directly contradict the immunized government witness(es). The Ninth Circuit has "found direct
8 contradictions where witnesses offer differing accounts of factual circumstances[.]" *United States*
9 *v. Wilkes*, 744 F.3d 1101, 1105 (9th Cir. 2014), and granted immunity requests accordingly. For
10 example, in *Straub*, an immunized government witness conceded that, if asked, he would deny that
11 he had confessed to a defense witness that he had "just shot a guy." 538 F.3d at 1162. The court
12 granted the defendant's request to compel immunity for his witness, who was prepared to testify
13 that the government witness had confessed to the same crime attributed to the defendant. *Id.* at
14 1162-63. Similarly, in *United States v. Young*, 86 F.3d 944, 946 (9th Cir. 1996), the government's
15 witness, John Drake, planned to testify that the two defendants used him as a middleman to
16 distribute cocaine. The court granted the defendants' request for immunity for a witness who was
17 prepared to testify that he heard Drake say he was falsely accusing someone as being his supplier,
18 which the court concluded directly contradicted Drake's testimony. *Id.* at 947.

19 In contrast, in *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004), the court
20 concluded the testimony sought—that the defense witness had been to many stash houses in the area
21 but had never been to the defendant's house—did not directly contradict statements by the
22 government's witnesses that the defendant's house was a stash house and denied the defendant's
23 immunity request. Put simply, "a witness directly contradicts another witness if their respective
24 testimonies cannot simultaneously be true, although in this context the proffered defense testimony
25 need only support (as opposed to compel) a finding by the jury that it was directly contradictory."
26 *Wilkes*, 744 F.3d at 1106.

27 This case is more like *Straub* and *Young* than *Alvarez*. Certainly, the [REDACTED] and
28 [REDACTED] descriptions of the origin story of the loan characterization cannot both be true. While

1 the testimony of other BPM partners does not contradict the immunized witness testimony head-on,
2 it certainly undercuts the government's theory and casts serious doubt as to Mr. Berger's state of
3 mind. Thus, the rationale behind the grants of immunity in *Straub* and *Young* compels the same
4 conclusion here: because the proposed defense witnesses' testimony directly contradicts the
5 immunized witnesses' testimony, the government's refusal to provide the defense witnesses use
6 immunity would be a distortion of the fact-finding process to the point where it would deny Mr.
7 Berger a fair trial. *See Alessio*, 528 F.3d at 1082

8 To be sure, in *Straub*, the court concluded that due process-infringing unfairness occurred
9 "where the government has liberally used its discretion to grant immunity to numerous witnesses"
10 rather than the one or two potentially immunized witnesses at issue here. 538 F.3d at 1160. But the
11 Ninth Circuit has never held that immunity for handfuls of government witnesses in the face of a
12 single defense witness is the only scenario that could give rise to judicially-compelled immunity.
13 Instead, it has recognized that it can apply when only "two eyewitnesses tell conflicting stories, and
14 only the witness testifying for the government is granted immunity" *Westerdahl*, 945 F.2d at
15 1087 (citations omitted). If anything, the fairness interest is all the more compelling when the
16 government's case rests on just one or two witnesses whose testimony would be crippled by the
17 testimony of a cadre of other witnesses.

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1 **V. CONCLUSION**

2 To ensure Mr. Berger's due process rights to a fundamentally fair trial, and for all of the
3 reasons described above, the Court should grant Mr. Berger's motion and compel the government to
4 grant use immunity to his potential witnesses. If the government refuses to grant use immunity to
5 the potential defense witnesses it has intentionally placed in dangerous legal peril to cause them to
6 invoke their Fifth Amendment privilege, the Court must dismiss the indictment. Separately, the
7 Court should compel the government to grant use immunity to the proposed defense witnesses
8 because they would offer contradictory testimony to the government's immunized witnesses. In the
9 alternative, the government must withdraw its immunized witness(es) or the Court must dismiss the
10 indictment.

11
12 Dated: February 22, 2018

KANE+KIMBALL LLP

13
14 /s/ Miranda Kane
15 MIRANDA KANE
16 JULIA M. BREYER

17 Attorneys for Marc Berger
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